RECORD AND BRIEFS

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No. 15-7250

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

MARCELO MANRIQUE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a notice of appeal from a sentencing judgment deferring restitution is effective to challenge the validity of a later-issued restitution award.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A4) is not published in the Federal Reporter but is available at 618 Fed. Appx. 579.

JURISDICTION

The judgment of the court of appeals was entered on July 15, 2015. A petition for rehearing was denied on September 11, 2015 (Pet. App. B1). The petition for a writ of certiorari was filed on December 2, 2015. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Southern District of Florida, petitioner was convicted on one count of possessing a visual depiction of a minor engaging in sexually explicit conduct, in violation of 18 U.S.C. 2252(a)(4)(B) and (b)(2). The district court sentenced petitioner to 72 months of imprisonment and a life term of supervised release. It also ordered restitution in the amount of $4500. The court of appeals affirmed. Pet. App. A1-A4; Gov't C.A. Br. 1-2.

1. Petitioner was found in possession of child pornography on his computer, including a movie depicting an adult male anally penetrating a toddler, who appeared to be less than six years old. Gov't C.A. Br. 3. Pursuant to a plea agreement, petitioner pleaded guilty to one count of possessing a visual depiction of a minor engaging in sexually explicit conduct. See Id. at 1, 4.

At a sentencing hearing conducted on June 23, 2014, the district court imposed on petitioner a 72-month term of imprisonment and a life term of supervised release. It also ordered him to pay a special assessment of $100. Because the victims' losses had not yet been ascertained, the court scheduled a restitution hearing for the final determination of the victims' losses. Gov't C.A. Br. 1-2. The court's judgment

was entered on the docket the next day, June 24. The judgment memorialized the imprisonment, supervised release, and special assessment aspects of the sentence. It also stated that the determination of restitution was deferred and that an amended judgment would be entered after a determination of restitution. Id. at 2, 23. On July 8, petitioner filed a notice of appeal from the judgment that had been entered against him on June 24. Id. at 23.

On September 17, 2014, the district court conducted a restitution hearing. At the conclusion of the hearing, the court orally ordered petitioner to pay $4500 in restitution. The next day, September 18, the court entered an amended judgment, adding the order of restitution to the original judgment. Gov't C.A. Br. 24. Petitioner did not file a notice of appeal from the court's oral order or from the amended judgment. Ibid.

2. On appeal, petitioner challenged his life term of supervised release and the restitution order. As to the restitution order, the government argued that, under United States v. Muzio, 757 F.3d 1243, 1250 n.9 (11th Cir.), cert. denied, 135 S. Ct. 395 (2014), petitioner had waived his right to challenge the restitution order by failing to file a notice of appeal from the district court's oral ruling or from the

amended judgment. Gov't C.A. Br. 22-25.[1] The government also argued that the restitution order was correct. Id. at 26-32.

The court of appeals affirmed. Pet. App. A1-A4. As relevant here, it held that it "d[id] not have jurisdiction to entertain [petitioner's] challenge to his restitution amount because he did not file a notice of appeal designating the amended judgment setting forth the restitution amount." Id. at A4. The court noted that, in United States v. Kapelushnik, 306 F.3d 1090, 1093-1094 (11th Cir. 2002), it had previously held that an appeal from a sentencing judgment deferring restitution was premature and did not ripen until the district court either (1) ordered restitution or (2) lost the power to do so after 90 days. Following that decision, Dolan v. United States, 560 U.S. 605, 611 (2010), held that "[t]he fact that a sentencing court misses the [restitution] statute's 90-day deadline * * * does not deprive the court of the power to order restitution." The court of appeals explained that, in light of Dolan, it had been forced to reconsider the "Kapelushnik framework" to avoid the possibility that "an appeal [might] never ripen." Pet. App. A3. Accordingly, the court explained, in Muzio it had addressed that problem by establishing the following framework:

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[1] Petitioner incorrectly asserts that "the government posited no objection" to the court of appeals' consideration of his challenge to the restitution order. Pet. ii; see Pet. 23.

> [W]hen courts enter sentencing judgments ordering restitution but deferring determination of the amount, defendants have the option to either (a) timely appeal from the initial judgment and then, if desired, timely appeal from the subsequent judgment finalizing the amount of restitution, or (b) timely appeal from the subsequent judgment only, in which case all issues will be heard in a single appeal.

Ibid. Because petitioner did not follow either option, the court of appeals determined that it could not consider his challenge to the restitution order. Id. at A4.

The court of appeals rejected petitioner's argument that his premature notice of appeal had "ripened" following the entry of the amended judgment, explaining that "that argument relies on the Kapelushnik framework, which Muzio's framework replaced." Pet. App. A4. In order to challenge the restitution order, petitioner "was required to either appeal both the original judgment and the amended judgment, or appeal the amended judgment only," but he did not do either. Ibid. The court accordingly dismissed petitioner's challenge to the restitution order. Ibid.

ARGUMENT

Petitioner argues (Pet. 10-13, 18-24) that the court of appeals was wrong to hold that his failure to appeal from the amended judgment precluded his appellate challenge to the restitution order contained in that judgment. Petitioner also argues (Pet. 13-18) that the lower courts are divided on whether a notice of appeal from a sentencing judgment deferring restitution is effective to challenge the validity of a later-issued restitution award. The holding below is correct, and, although some disagreement exists among the courts of appeals, there is no square conflict. Further review is unwarranted.

1. a. In Dolan v. United States, 560 U.S. 605 (2010), this Court held that 18 U.S.C. 3664(d)(5), which gives a district court 90 days after sentencing in which to fix an amount of restitution, is not jurisdictional. 560 U.S. at 609-611. The petitioner had argued that allowing a district court to impose restitution beyond the 90-day deadline would prejudicially interfere with a defendant's ability to timely challenge his conviction and other portions of his sentence. The Court disagreed but acknowledged that "the interaction of restitution orders with appellate time limits could have consequences extending well beyond cases like the present case (where there was no appeal from the initial conviction and sentence)." Id. at 618. The Court therefore left "for another

day" the issue of "whether or when a party can, or must, appeal." Ibid. At the same time, the Court noted with approval the following procedure:

> [I]t is not surprising to find instances where a defendant has appealed from the entry of a judgment containing an initial sentence that includes a term of imprisonment; that same defendant has subsequently appealed from a later order setting forth the final amount of restitution; and the Court of Appeals has consolidated the two appeals and decided them together.

Ibid.

b. The court of appeals' adoption of the procedural framework described in Dolan is consistent with the Federal Rules of Appellate Procedure. Rule 4(b) governs the time for filing a notice of appeal in a criminal case. As relevant here, it provides:

> In a criminal case, a defendant's notice of appeal must be filed in the district court within 14 days after the later of:
> (i) the entry of either the judgment or the order being appealed; or
> (ii) the filing of the government's notice of appeal.

Fed. R. App. P. 4(b)(1)(A). Under that rule, when "the judgment or the order being appealed" is an order of restitution or a judgment that reflects such an order, the defendant must file a notice of appeal within 14 days after that order or judgment (or, if a notice of appeal is filed by the government, within 14 days of the government's notice). Where a sentencing court

enters an initial judgment that defers the issue of restitution, a notice of appeal from that initial judgment will not have the effect of appealing a later award of restitution. Rather, a notice of appeal must be filed following "the judgment or the order being appealed" -- that is, following the order of restitution itself or the amended judgment that incorporates the order of restitution. Ibid.

That conclusion is reinforced by Rule 4(b)(3)(C), which provides that, with respect to certain motions listed in Rule 4(b)(3)(A), "[a] valid notice of appeal is effective -- without amendment -- to appeal from an order disposing of any of the motions referred to in Rule 4(b)(3)(A)." The motions mentioned are a motion for a judgment of acquittal, certain motions for a new trial, and a motion for arrest of judgment. See Fed. R. App. P. 4(b)(3)(A). Rule 4(b) thus specifies that, for a limited category of motions, a notice of appeal is effective "without amendment" as a means of appealing from a later-issued order disposing of those motions. The clear implication is that similar latitude is not allowed for other types of orders, such as a post-judgment order setting the amount of restitution.

In the deferred-restitution scenario, therefore, a defendant who wishes to challenge restitution has two alternatives: He can wait to file a notice of appeal once the amended judgment has been issued; or, if he has already filed a

notice of appeal from the initial judgment, he can and must file an amended notice of appeal from the amended judgment. That procedure serves "[s]ystemic interests in the conservation of judicial resources," which "dictate that a party must not appeal an order simply because he believes it will be adverse." United States v. Cooper, 135 F.3d 960, 963 (5th Cir. 1998). Instead, a defendant who wishes to challenge an order of restitution should file a notice of appeal after the order has been finalized and entered, which will enable the defendant to evaluate the relevant legal rulings and their practical significance and make a considered decision -- before he files his appeal -- as to whether he has a basis for challenging the restitution ruling.

c. The decision below accords with those principles. The initial judgment entered by the sentencing court on June 24 did not contain an order of restitution; rather, the court orally ordered petitioner to pay restitution on September 17, and the court incorporated that order into an amended judgment on September 18. Under those circumstances, as the court of appeals explained, petitioner had two options for challenging the restitution order: "(a) timely appeal from the initial judgment and then * * * timely appeal from the subsequent judgment finalizing the amount of restitution, or (b) timely appeal from the subsequent judgment only." Pet. App. A3. Petitioner did neither, instead filing a notice of appeal solely

from the initial judgment. Petitioner's notice of appeal from the initial judgment was "premature" as a means of challenging the later-issued restitution order, and petitioner "did not file a notice of appeal designating the amended judgment setting forth the restitution amount." Id. at A4. Thus, the court correctly declined to review petitioner's appellate challenge to restitution. See ibid.

d. Petitioner acknowledges (Pet. 10) that his notice of appeal from the initial judgment was "[p]remature" as a means of challenging the later-issued restitution order, but he nevertheless argues that the notice of appeal "mature[d]" under Rule 4(b)(2). Rule 4(b)(2) creates a limited exception to the requirements set out in subsection (b)(1) by providing that a notice of appeal "filed after the court announces a decision, sentence, or order -- but before the entry of the judgment or order -- is treated as filed on the date of and after the entry." Fed. R. App. P. 4(b)(2). The limited exception in Rule 4(b)(2) does not help petitioner. It applies only to notices of appeal filed "after" the court announces a decision but before the formal "entry" on the docket of the order or judgment. Here, by contrast, petitioner filed a notice of appeal several months before both the order of restitution and the amended judgment. Allowing an appellate challenge to restitution under those circumstances would conflict with the requirement in Rule

4(b)(2) that the notice of appeal must be filed "after" the decision sought to be appealed. Ibid.

Contrary to petitioner's argument (Pet. 10-11), the decision below is also consistent United States v. Lemke, 346 U.S. 325 (1953), in which this Court interpreted former Fed. R. Crim. P. 37(a)(2), a predecessor to the current Fed. R. App. 4(b)(1)(A). There, the defendant had filed a notice of appeal after sentencing but before the formal entry of judgment, and the court of appeals "dismissed [his appeal] as premature." 346 U.S. at 326. The Court found the defendant's premature filing to be harmless error under Rule 52(a), emphasizing that the notice of appeal in that case was "still on file" when the judgment was issued and "gave full notice after that date, as well as before, of the sentence and judgment which petitioner challenged." Ibid. The Lemke decision was incorporated in Fed. R. App. P. 4(b)(2). See Pet. 11-12.

As explained above, the court of appeals' decision is consistent with Rule 4(b)(2), and therefore it accords with Lemke as well. In Lemke, the defendant filed his notice of appeal after his conviction and sentencing; only the ministerial task of entering the judgment remained. Here, by contrast, the notice of appeal at issue was filed several months before the restitution order sought to be challenged on appeal. The notice

of appeal was therefore ineffective as a means of challenging restitution.

2. Petitioner contends (Pet. 13-18) that the lower courts are divided 8-2 on whether a notice of appeal from a sentencing judgment deferring restitution is effective to challenge the validity of a later-issued restitution award, but he greatly overstates the extent of any disagreement.[2]

Most of the decisions cited by petitioner do not involve restitution at all. Three of the decisions stand only for the uncontroversial proposition that, "[p]ursuant to Rule 4(b)(2) of the Federal Rules of Appellate Procedure, a notice of appeal filed after the district court announces its decision, but prior to the entry of judgment, is deemed to be 'filed on the date of and after the entry.'" United States v. Bly, 510 F.3d 453, 457 n.6 (4th Cir. 2007); see United States v. Andrews, 681 F.3d 509, 516 n.2 (3d Cir. 2012); United States v. Cantero, 995 F.2d 1407, 1408 n.1 (7th Cir. 1993). As noted above, that proposition does not assist petitioner because he did not file his notice of appeal "after the district court announce[d] its decision" regarding restitution. Bly, 510 F.3d at 457 n.6. Three of the

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[2] Petitioner also asserts (Pet. 18-22) that the ruling by the court of appeals below is in tension with its own prior decisions. But even if such an intra-circuit conflict existed, it would not warrant this Court's review. See Wisniewski v. United States, 353 U.S. 901, 902 (1957) (per curiam).

other decisions cited by petitioner apply harmless-error reasoning to permit appeal under circumstances far different from this case. See United States v. Thornton, 1 F.3d 149, 157-158 (3d Cir. 1991) (permitting defendant to appeal denial of motion for new trial based on government's alleged failure to disclose Brady evidence), cert. denied, 510 U.S. 982 (1993); United States v. Walker, 915 F.2d 1463, 1465 (10th Cir. 1990) (permitting appellate challenge to conviction where defendant filed notice of appeal after conviction but before sentence); United States v. Winn, 948 F.2d 145, 155-156 (5th Cir. 1991) (permitting appeal of sentence where defendant filed notice of appeal before sentence, then filed "re-notice of appeal" after sentence was issued, and government "did not contest" the re-notice of appeal), cert. denied, 503 U.S. 976 (1992).

Of the remaining decisions cited by petitioner, only one squarely deals with the precise situation presented here, and, although it is unpublished, it supports the ruling below. In United States v. Castro, 554 Fed. Appx. 664, 667, cert. denied, 135 S. Ct. 305 (2014), the Ninth Circuit declined to hear the defendant's challenge to a restitution order because "his three notices of appeal of the district court's restitution award were all filed months before the district court had even held a restitution hearing." Because the government had objected to

appellate review of that issue, the court held, "dismissal [of the appeal] is mandatory." Ibid.

The remaining cases cited by petitioner, only one of which is published, are distinguishable. In United States v. Cheal, 389 F.3d 35, 53 (2004), the First Circuit held that the defendant's notice of appeal from the judgment of conviction in that case "served to bring" a later restitution order "before [the court] for appellate consideration." The court also stated, however, that the defendant "should have filed a second notice of appeal" from the amended judgment incorporating the restitution order and that, "looking to the future, we think that, as a general proposition, a deferred restitution order * * * subsequent to a final judgment of conviction which has already been appealed, should be the subject of a second notice of appeal." Id. at 52 (footnote omitted). Accordingly, criminal defendants in the First Circuit will likely have to follow substantially the same procedures as those established by the Eleventh Circuit in Muzio and followed here.

Petitioner also cites two unpublished cases from the Sixth Circuit, but neither squarely conflicts with the decision below. In United States v. Malcolm, No. 95-1087, 1997 WL 311416 (6th Cir. Jun. 11, 1997) (114 F.3d 1190) (table), the court of appeals held that the district court had "blundered" when it entered an initial judgment despite deferring the issue of

restitution. Id. at *5. The Sixth Circuit concluded that the district court "did not enter a final judgment until" it entered an amended judgment that incorporated an order of restitution. Ibid. The court nevertheless permitted the defendant to challenge the restitution order based on his earlier-filed notice of appeal, which the defendant had filed after the initial judgment, noting that the government had not objected to the court's consideration of that issue. Id. at *7. The court acknowledged "the unusual procedural posture of th[e] case," ibid., which appears to reflect the court's view that judgments deferring restitution (as in this case) are not proper. And in United States v. Stoian, No. 15-5173, 2015 WL 5036366 (6th Cir. Aug. 12, 2015), the court of appeals stated that the defendants' notices of appeal from original judgments would "'spring forward' and confer jurisdiction" over later-filed amended judgments that incorporated restitution orders. Id. at *1. But in that case, "the defendants also appealed their amended judgments," ibid., and the court dismissed as duplicative the earlier appeals and instead "proceed[ed]" on "[t]he defendants' appeals from their amended judgments," id. at *2. Stoian thus is not case in which a notice of appeal from an original judgment of conviction deferring restitution provided the basis for the exercise of appellate review over a later-filed restitution order.

The Second Circuit's unpublished decision in United States v. Hyde, 556 Fed. Appx. 62 (2014), is also distinguishable. There, the defendant filed a timely notice of appeal after the district court entered its original judgment. Id. at 63 n.1. After the court filed an amended judgment incorporating a restitution order, the defendant did not file a new notice of appeal from the amended judgment, ibid., but neither did the defendant challenge his restitution on appeal. Instead, the defendant appealed "only with respect to [a] special condition of supervised release," which had been contained in the original judgment. Id. at 63. Therefore, although the court stated that the defendant's notice of appeal from the original judgment "ripened into an effective notice of appeal from the amended judgment as well," id. at 63 n.1 (citation and internal quotation marks omitted), that statement was not necessary to its decision to consider the defendant's challenge to the condition of his supervised release. The decision below by the Eleventh Circuit would similarly have permitted appellate consideration of the defendant's challenge to supervised release under the circumstances presented in Hyde.

Finally, petitioner contends (Pet. 17) that the ruling below is at odds with decisions from other Circuits because the court of appeals in this case stated that it "d[id] not have jurisdiction" (Pet. App. A4) to entertain petitioner's appeal of

the restitution order, whereas the First, Second, Sixth, and Ninth Circuits "recognize their jurisdiction" (Pet. 17) over such an appeal. That distinction, however, does not independently warrant the Court's review. When a court of appeals declines to review a defendant's challenge to restitution because the defendant filed his notice of appeal before the restitution order, the practical result is the same regardless whether the court of appeals describes its ruling as "jurisdiction[al]," Pet. App. A4, or merely "mandatory," Castro, 554 Fed. Appx. at 667.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 2016

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CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served with copies of the **BRIEF FOR THE UNITED STATES IN OPPOSITION**, via email and by first-class mail, postage prepaid, this 4th day of March, 2016.

[See Attached Service List]

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March 4, 2016

Due to the continuing delay in receiving incoming mail at the Department of Justice, in addition to mailing your brief via first-class mail, we would appreciate a fax or email copy of your brief. If that is acceptable to you, please fax your brief to Charlene Goodwin, Supervisor, Case Management Specialist, Office of the Solicitor General, at (202) 514-8844, or email at SupremeCtBriefs@USDOJ.gov. Ms. Goodwin's phone number is (202) 514-2217 or 2218. Thank you for your consideration of this request.

15-7250
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